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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TROY ANGELO GONZALEZ, Defendant and Appellant.	E069940 (Super.Ct.No. SWF007132) OPINION

APPEAL from the Superior Court of Riverside County. Mark Ashton Cope, Judge. Affirmed.

David P. Lampkin, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Michael Pulos, Seth M. Friedman, and Nora S. Weyl, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Troy Angelo Gonzalez, filed a petition pursuant to Penal Code section 1170.126[1] to have his third strike sentence reduced, which the court denied. On appeal, defendant contends the court erred in denying his petition. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND[2]

On November 11, 1988, defendant was convicted of burglary and sentenced to state prison for two years. He was paroled in January 1989. On January 29, 1990, he pled guilty to 20 counts of first degree burglary involving 20 different elderly victims on separate occasions and three counts of sexual battery against three of the elderly burglary victims. The court sentenced defendant to 21 years in state prison. He was paroled and had that parole revoked on two separate occasions.

On February 24, 2003, defendant was again released on parole. His parole agents repeatedly informed him in writing and orally of his legal duty under section 290 to register as a sex offender. Defendant, however, failed to do so. Defendant's parole agent could not locate defendant between April 21 and May 14, 2003, after defendant had left a program in Orange County. Defendant was cited in the City of Hemet on March 20, 2003, a city he had no permission to be in as a number of the homes he had burglarized were located therein. Officers twice arrested defendant for drug offenses. Officers apparently arrested defendant on parole violations on May 14, 2003.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] The court below, in rendering its decision, relied in part on our opinion in case No. E037892, defendant's appeal of his underlying conviction. We take judicial notice of our opinion in case No. E037892. (Evid. Code, § 459.)

The People charged defendant by felony first amended information with two counts of failure to register as a sex offender (counts 1 & 2; § 290, subd. (g)(2)), a prior prison term allegation (§ 667.5, subd. (b)), and 22 prior strike conviction allegations (§§ 667, subds. (c), (e)(2)(A), 1170.12, subd. (c)(2)(A)). A jury convicted defendant of one count of failing to register as a convicted sex offender. (§ 290.) Defendant thereafter admitted that he had served one prior prison term (§ 667.5, subd. (b)) and had suffered 21 prior strike convictions (§ 667, subds. (c)-(e)).[3]

Defendant filed a motion to strike 20 of his prior strike conviction enhancements, which the court denied. On March 18, 2005, pursuant to the "Three Strikes" law, the court sentenced defendant to a total term of 26 years to life in state prison. Defendant appealed, contending the trial court erred in denying his motion to strike his prior strike convictions. We affirmed.

On January 17, 2013, defendant filed a petition for writ of habeas corpus seeking resentencing pursuant to section 1170.126. On January 24, 2013, the court denied defendant's petition, finding him ineligible for relief because he was a registered sex offender. On September 6, 2013, defendant's counsel filed supplemental points and authorities in support of his petition for resentencing. The court, apparently inclined to reconsider its previous denial, ordered multiple continuances of the matter by stipulation of the parties or upon defense counsel's motions. On May 22, 2015, defendant's counsel

[3] On the People's motion, the court dismissed one of the 22 alleged prior strike conviction allegations.

requested a stay of the proceedings until resolution by the California Supreme Court of the issue of the standard for determining dangerousness pursuant to section 1170.126. The court granted the stay.

On December 22, 2017, defense counsel filed a Proposition 36 sentencing/resentencing brief. Defense counsel argued that defendant was eligible for resentencing unless the People proved defendant posed an unreasonable risk to public safety, which the People could not do. On the same day, the People filed opposition to defendant's petition, contending the court should deny defendant's petition because he posed an unreasonable risk of danger to public safety. The People simultaneously submitted what amounts to five volumes of supplemental clerk's transcripts containing defendant's administrative record while imprisoned. After argument at the hearing at which defendant was present on January 26, 2018, the court denied defendant's petition.

II. DISCUSSION

Defendant contends the court abused its discretion in denying defendant's petition by finding defendant would pose an unreasonable risk of danger to public safety. Specifically, defendant maintains the court misinterpreted the phrase "risk of danger to public safety" such that its ruling was based on inapplicable law. We disagree.

Defense counsel below conceded that defendant had an "admittedly significant discipline" record while incarcerated. Nonetheless, defense counsel argued defendant's disciplinary record consisted exclusively of multiple incidents of indecent exposure which were neither violent themselves nor indicative of a violent propensity. The People

maintained that defendant's multiple behavioral issues while incarcerated when viewed through the prism of defendant's prior criminal history reflected that he had a propensity to pose an unreasonable risk of danger to public safety.

The court noted that, in order to make a dangerousness determination, it was incumbent upon it to consider defendant's criminal background, what led to his imprisonment, and what he had been doing while imprisoned. The court reviewed our opinion from defendant's appeal of his underlying conviction, specifically quoting sections which reflected defendant's criminal history prior to the underlying conviction and some of the circumstances of the underlying conviction. The court reviewed, in depth, the circumstances of five of defendant's administrative rule violations while noting, twice, "there are more." Contrary to defense counsel's argument, the court did not believe defendant's administrative disciplinary proceedings for masturbation were simply attempts to "release [himself] within a situation where he's unable to find privacy."[4] The court noted: "I believe he's done it in order to exhibit and exercise control over people who don't have an option. It looks like they're women who are unable to leave or otherwise to avoid the circumstances, and that is remarkably similar to the circumstances of the burglaries and sexual assaults . . . ."

[4] As described more fully below, defendant's substantial administrative record of rule violations primarily consisted of indecent exposures during which defendant would repeatedly masturbate while calling attention to himself primarily to female staff members at whom he sometimes yelled profanities and threats. The victims described feeling "disrespected and disgusted," "disgust[ed] and very demean[ed]," "violated and thoroughly disgusted," "shocked and disgusted," and "disgusted and offended."

The court found defendant's sexual assaults upon elderly women in his underlying convictions were done "out of violence and control, and there is substantial evidence to believe that nothing would change; that he does present a danger—unreasonable risk of danger to society if he were to be released." Contrary to defense counsel's definition, the court did not define violence as "hitting or shooting or anything that's necessarily going to leave a physical mark." Rather, "this kind of sexual violence is—this kind of sexual conduct is violence. It's violence to the women who are his victims. And, frankly, it's violence to everybody else in society who's left either in fear of this kind of an assault or left as a suspect because women are in fear of this kind of assault." The court denied the petition.

"In November 2012, California voters enacted Proposition 36, the Three Strikes Reform Act of 2012 (Proposition 36 or Three Strikes Reform Act). With some exceptions, Proposition 36 modified California's 'Three Strikes' law to reduce the punishment imposed when a defendant's third felony conviction is not serious or violent. [Citation.] It also enacted a procedure governing inmates sentenced under the former Three Strikes law whose third strike was neither serious nor violent, permitting them to petition for resentencing in accordance with Proposition 36's new sentencing provisions. [Citation.] The resentencing provisions provide, however, that an inmate will be denied resentencing if 'the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' [Citation.] Proposition 36

did not define the phrase 'unreasonable risk of danger to public safety.'" (*People v. Valencia* (2017) 3 Cal.5th 347, 350.)[5]

"In exercising its discretion to deny resentencing, the court has broad discretion to consider: (1) the inmate's 'criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes'; (2) his or her 'disciplinary record and record of rehabilitation while incarcerated'; and (3) '[a]ny other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety.' [Citation.] Thus, as the Legislative Analyst explained in the Voter Information Guide, '[i]n determining whether an offender poses [an unreasonable risk of danger to public safety], the court could consider *any evidence* it determines is relevant, such as the offender's criminal history, behavior in prison, and participation in rehabilitation programs.' [Citation.]" (*People v. Valencia*, *supra*, 3 Cal.5th at p. 354.)

"We, therefore, review that determination for abuse of discretion. Of course, if there is no evidence in the record to support the decision, the decision constitutes an

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[5] Neither party, either below or on appeal, contests defendant's preliminary eligibility for resentencing, i.e., the parties do not contest that defendant's commitment offense, failure to register as a sex offender, is neither violent nor serious for purposes of section 1170.126. Section 1170.126, subdivision (e) provides that an inmate is eligible for resentencing if the offense for which the court sentenced the inmate was not a so-called "super strike" or serious or violent felony. Since failure to register as a sex offender is neither a so-called "superstrike" nor a serious nor violent felony, defendant is preliminarily, statutorily eligible for resentencing pursuant to section 1170.126.

abuse of discretion. [Citation.]" (*People v. Buford* (2016) 4 Cal.App.5th 886, 895.) "[T]he People have the burden of establishing, by a preponderance of the evidence, facts from which a determination resentencing the petitioner would pose an unreasonable risk of danger to public safety can reasonably be made." (*Id.* at p. 899.) "'"[T]he relevant inquiry is whether [a petitioner's prior criminal and/or disciplinary history], when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years [later]. This inquiry is . . . an individualized one, and cannot be undertaken simply by examining the circumstances of the crime in isolation, without consideration of the passage of time or the attendant changes in the inmate's psychological or mental attitude. [Citation.]" [Citation.]' [Citation.]" (*Id.* at p. 914.)

The court acted within its discretion in denying defendant's petition. As the court recounted, defendant's underlying criminal history was substantial and violent. Defendant was convicted of burglary and sentenced to two years of imprisonment in November 1988. After serving approximately two months of his sentence, defendant was paroled and "went on a crime spree." That crime spree consisted of offenses involving first degree burglary against 20 elderly victims on 20 separate occasions, three of the elderly victims against whom he was convicted of committing sexual battery.

The first sexual battery involved a situation wherein defendant entered the 77-year-old victim's home, grabbed her from behind, took her to the bed, and pushed her onto it. Defendant touched her breasts and began to undo his pants. The victim said she

was too old. Defendant left the home with the victim's purse, which contained her credit cards and $90 in cash. The second sexual battery involved an 83-year-old victim who was in her kitchen when she heard a noise, looked up, and saw defendant. Defendant grabbed her as she ran and knocked her to the ground. As she screamed, defendant told her to "'[s]hut up or I'll kill you.'" Defendant pushed her into the bedroom, where he tried to pull her pants off. Defendant forced the victim to feel his privates and said, "'I'll stick you with this if you don't give me all your money.'" Defendant grabbed her purse and fled.

The third sexual battery involved an 80-year-old victim who was sleeping when she felt the covers ripped off her. Defendant cupped his hand over her vagina. The victim's screams caused defendant to flee. Defendant stole the victim's nightgown and purse. The nightgown was recovered in the bushes outside the victim's residence. Thus, the court's determination that defendant's assaults on elderly women were done "out of violence and control," is supported by substantial evidence. Moreover, all 20 of defendant's underlying convictions support a determination that defendant was, at that time, under current law, a violent felon. (See §§ 667.5, subd. (c)(9) [robbery is a violent crime], (15) [assault of another with intent to commit mayhem, rape, sodomy, oral copulation are violent crimes], (21) [any burglary of the first degree committed when a person, other than an accomplice, was present are violent crimes].)

Furthermore, a review of defendant's voluminous administrative record while incarcerated supports the court's determination that defendant continued to display a

strong inclination toward sexual violence. By our count, between September 10, 2013, and May 11, 2017,[6] defendant suffered nearly three dozen administrative determinations of guilt for various rules infractions while incarcerated, the overwhelming majority of which involved calling attention to himself by exhibiting his penis to female staff members, masturbating, and making eye contact with those staff members; several additionally involved refusing to stop and calling those staff members' names and/or threatening them.

As did the court below, we summarize some of the worst violations: On May 12, 2014, at approximately 7:30 p.m., a certified nursing assistant making her rounds shined a light in defendant's cell;[7] defendant had his smock removed and his blanket covering only his legs; defendant made eye contact with the nurse and stroked his penis.

After the supervising nurse informed defendant she was filing a rules report violation, defendant yelled continuously for hours, in portions, threatening the supervising nurse who wrote him up. Defendant yelled, "'Fuck you, [supervising nurse].'" "'Fuck you, I am going to get you.'" "'You stupid bitch . . . .'" "'[Supervising Nurse], suck my dick, swallow my cum.'" "'Hey [supervising nurse] come suck my

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[6] Conspicuously absent is any record of defendant's behavior while incarcerated between his sentencing on March 18, 2005, and his first rules violation contained in the administrative record on September 10, 2013.

[7] Defendant appears to have spent the bulk, if not the entirety, of his time incarcerated in what has been variously described in the record as the Mental Health Crisis Bed Unit, Mental Health Services Delivery System, Mental Health Crisis Bed, and the Correctional Treatment Center. Defendant was on suicide watch for at least a portion of this time as well.

dick. [Supervising nurse] is a stupid, stupid bitch. [Supervising nurse] is crying, red headed bitch. That bitch is going to bow down to me. You, [supervising nurse], are a piece of shit, go fuck yourself, and suck my dick.'" Notably, defendant incurred a third rules report violation later that day for again masturbating in front of the certified nursing assistant performing cell checks.

On December 14, 2014, a psychiatric technician witnessed defendant masturbating underneath a blanket. The technician ordered him to stop; defendant refused. Defendant yelled at the technician: "'[W]hat bitch[?]'" "'Fuckin Cunt,'" "'Weird as[s] Bitch,'" and "'Bitch.'"

On July 16, 2016, defendant tapped on the door to gain the suicide precaution observer's attention; when she looked to see what he was doing, she saw defendant standing at the cell door without his smock on, masturbating, and staring directly at her. On June 3, 2017, while on the phone, a certified nurse's assistant noticed someone attempting to get her attention. She looked up and noticed defendant standing on the toilet in his cell, waving his hand trying to get her attention, and stroking his erect penis while making eye contact with her. She ordered him to stop; defendant started waving his penis around; he said, "'you know you like this dick, don't be a bitch and write me up.'" "'[F]uck you[,] you stupid bitch . . . . I told that nurse you're not a [victim,] you're a whore.'" As the court aptly noted, "there are more" such incidents.

Although prison officials referred many of the rules report violations for prosecution, personnel from the deputy attorney's office overwhelmingly refused to

prosecute. Nonetheless, defendant appears to have been convicted of indecent exposure on July 1, 2010, while he was incarcerated. Moreover, defendant had been deemed to have had an active history of aggression towards staff, which included threats of violence and self-admitted claims of mutual combat toward other inmates. Furthermore, on multiple occasions, "mechanical restraints" were required for defendant's transportation, in some cases due to the danger defendant was deemed to pose to others.

Thus, the court acted within its discretion in determining that defendant's conduct in prison involved attempts to "exercise control over people who don't have an option. It looks like they're women who are unable to leave or otherwise to avoid the circumstances, and that is remarkably similar to the circumstances of the burglaries and sexual assaults . . . ." Defendant's behavior, which resulted in numerous guilty adjudications regarding rules violations while incarcerated, reflected attempts to control and sexually expose himself to female staff members to the greatest extent that he was able; in other words, defendant's incarceration, his placement in a cell and shackles, were inferentially the only things restricting him from committing actual sexual violence against staff members. As the court below noted, if released "there is substantial evidence to believe that nothing would change; that he does present a danger—unreasonable risk of danger to society if he were to be released." The court acted within its discretion in determining that defendant would pose an unreasonable risk of danger to society if he were to be released.

Defendant maintains that the court's statement that defendant's acts of exposing himself to prison personnel were, in and of themselves, acts of violence, reflecting the court misunderstood the appropriate legal standard required to deny the requested relief. He contends the court's statements would include conduct which is offensive, but not violent. We would agree with defendant that the incidents of indecent exposure while incarcerated were not in and of themselves "violent." Nevertheless, those acts, when viewed in context with defendant's prior criminal history, inferentially reflect a desire to commit sexual violence against women. The court's denial of defendant's petition was within its discretion.

III. DISPOSITION

The judgment is affirmed.

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McKINSTER
Acting P. J.

We concur:

SLOUGH
J.

MENETREZ
J.